IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

TIM COOK, PLAINTIFF,

VERSUS CIVIL ACTION NO. 1:95CV140-S-D

UNION CAMP CORPORATION, DEFENDANT.

MEMORANDUM OPINION GRANTING DEFENDANT'S
MOTION TO DISMISS

This cause of action is before the court on the motion of the defendant to dismiss, or, in the alternative, for summary judgment. The plaintiff has confessed that he does not have a Rehabilitation Act claims against the defendant. The only remaining claim before the court is based upon the American's with Disabilities Act (ADA), 42 U.S.C. § 12117(a). The defendant's motion to dismissed asserts that the plaintiff failed to file his EEOC charge within 180 days of the alleged discriminatory act, his discharge. The plaintiff argues that the 180 days was tolled pending the completion of the union contract grievance proceedings. Additionally, the plaintiff contends that the defendant has waived raising the statute of limitation problem, since it did not raised the issue in response to the EEOC charges.

Standard for Dismissal

A Rule 12(b)(6) motion is not favored, and it is rarely granted. Clark v. Amoco Production Company, 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes,

416 U.S. 232, 236 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. Clark, 794 F.2d at 970; Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." Clark, 794 F.2d at 970; see also Mahone v. Addicks Utility District, 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consolidated Independent School District, 625 F.2d 547, 549 (5th Cir. 1980). Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see Mahone, 836 F.2d at 926; McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir 1987); Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984). While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark, 794 F.2d at 970; Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982).

Facts

Tim Cook worked for the defendant for eighteen years. On July 10, 1991, he suffered a severe injury to his back and left hip including a fracture at the L3 level and a pelvic fracture. After

extensive treatment, Cook returned to work for nearly three years. On August 4, 1994, the plaintiff was terminated. According to the union contract, the plaintiff timely filed a grievance on August 8, 1994. On September 9, 1995, the arbitrator agreed with the company that there was no "bargaining unit" jobs available which the plaintiff was capable of performing.

The plaintiff transmitted a signed facsimile EEOC charge after business hours on February 1, 1995, to the Employment Commission. The plaintiff's charges were marked "received" on February 2, 1995. The plaintiff admits that the 180 day EEOC statute of limitations ran on January 31, 1995. On February 7, 1995, the defendant was given notice of the filing of the charge. The defendant made a detailed response to the EEOC charges, but did not raise the statute of limitation until answering the complaint sub judice.

Discussion

The plaintiff argues that since the defendant received notice of the filing of the EEOC charges within 190 days of the discriminatory act, then the spirit of the statute of limitations setforth in 42 U.S.C. § 2000e-5 has been satisfied. Section 2000e-5(e)[1] provides:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, ...

[1] Although the ADA does not contain an explicit statute of limitations, Title I incorporates by reference the remedial provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(b) (incorporating by reference 29 U.S.C. § 701 et seq.).

Clearly the plaintiff was under an obligation to file his charges with the EEOC within 180 days of the unlawful employment practice. It then is incumbent upon the Commission to notify the employer of the charges. The fact that the defendant received notice of the filed charges within 190 days is irrelevant.

The plaintiff next argues that his termination was not final on August 4, 1994, since the union grievance proceeding was not completed until September 9, 1995. In International Union of Elec., Radio, and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976) the United States Supreme Court stated:

> We think that petitioners' arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures under the collective-bargaining contract are virtually foreclosed by our decisions in Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), and in Johnson v. Railway Express Agency, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). In Alexander we held that an arbitrator's decision pursuant to provisions in a collective-bargaining contract was not binding on an individual seeking to pursue his Title VII remedies in court. We reasoned that the contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII "have legally independent origins and are equally available to the aggrieved employee," 415 U.S. at 52, and for that reason we concluded:
>
> > "[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." Id., at 54.

Id. 429 U.S. at 236; see also Delaware State College v. Ricks, 449 U.S. 250, 261 (1980) ("[W]e already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations

periods."). In Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473 (5th Cir. 1991), the Fifth Circuit stated:

> None of the circumstances Barrow cites are bases for equitable tolling. First, the internal union grievance procedure is not a basis because the pendency of a grievance does not suspend the 180 day limitation for filing a charge.

Id. 932 F.2d at 478 (citing Delaware State College); see also McNeill v. Atchison, Topeka & Santa Fe Ry. Co., 878 F.Supp. 986, 989 (S.D.Tx. 1995) (running of limitations period for filing a discrimination claim is not tolled while the employee exhausts his remedies under a grievance procedure).

Finally, the plaintiff argues that the defendant has waived any statute of limitation problem, since the issue was not raised in response to the EEOC charges. No case has been cited for this proposition. The court has found two case which have held that failure to raise a statute of limitation issue at the EEOC level does not constitute a waiver. In Janowiak v. Corporate City of South Bend, 576 F. Supp. 1461 (N.D. Ind. 1983), the district court stated:

> Here, the defendants properly raised the issue of the plaintiff's failure to comply with the statutory 180-day time limit of 42 U.S.C. § 2000e-5(e) as an affirmative defense under F.R.Civ.P. 8(c). Because, as noted above, this court is not bound by the underlying administrative proceedings related to the filing of the discrimination charge with the EEOC (indeed, the EEOC proceedings form no part of this court's record herein), the defendants' decision not to raise the affirmative defense of the statute of limitations unless and until the plaintiff's charge gravitated to federal court cannot be construed as a waiver of said defense.

Id. 576 F.Supp. at 1465 (rev'd by on other grounds by Seventh Circuit which was rev'd by United States Supreme Court; on remand Seventh Circuit affirmed district court's decision); see also

Byrnes v. Herion Inc., 757 F. Supp. 648, 653 (W.D. PA. 1990) (failure to raise at EEOC level does not constitute waiver). Due to the nature of the proceedings before the EEOC and their limited effect in this court, failure to have raised the 180 day limitation issue before the EEOC does not waive the right to raise the issue as an affirmative defense when answering a subsequent complaint.

An order in accordance with this memorandum opinion shall be issued.

This the _____ day of April, 1996.

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CHIEF JUDGE